STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

[redacted]

V

LIVE. LAUGH AND LEARN DAYCARE

DECISION OF THE HEARING OFFICER

Appearances: Leslie C. Nixon Esq., Attorney for the Claimant

Nature of Dispute: RSA 275-E: 4 I Whistle Blowers Protection Act

Employer: Live, Laugh & Learn Daycare**,** C/o Diane Allen**,** 23 Whippoorwill Drive**,** Newton, New Hampshire 03858

Date of Hearing: July 19, 2012

Case No.: 42606

BACKGROUND AND STATEMENT OF THE ISSUES

A complaint under RSA 275-E: 4 I was filed on September 28, 2011. There were several scheduling delays in going forward with this hearing. The claimant is seeking back pay, damages for emotional distress, front pay and attorney's fees.

The claimant believes that she was terminated from her employment because she made reports of what she perceived as violations of law, the fact that she participated in a hearing and because she refused to execute an illegal order. At the start of the hearing, the claimant stated that she is seeking back pay to August 11, 2011. She is leaving any award for emotional distress up to the Hearing Officer. She withdrew the request for "front pay" and is asking for attorney's fees. The attorney stated that the amount of the fees would be submitted in two weeks from the date of the hearing.

The claimant testified that she started working for the employer in December of 2010. She was an Infant Teacher, working 35 – 40 hours per week at an hourly rate of $11.00. The claimant stated that there were three children in the Infant Room where she worked.

The claimant reported several issues to her supervisor about where people were smoking in violation of the State Daycare Rules. She does not believe that anything was done about this practice.

She also reported that a child was going "upstairs" to a different level room and this was not supposed to be done. The child was the grandchild of the owner.

Finally the claimant reported that there was an injury to a child that was not reported to the State authorities because the child was in a level room where the child was not supposed to be. The claimant was not there on the day of the incident but did not feel that the owner reported it correctly. The owner "yelled" at the claimant about raising the issue because the claimant was not there when it happened.

The claimant testified that she reported the violation to her supervisor but was not aware if anything was done. On March 28, 2011 the claimant was terminated for the reason that there was only one child left in the "Infant Room" and this census could not justify a full time employee assigned to the child. The claimant feels that she was let go because of her reporting of the incidents cited before.

The claimant's supervisor testified that she worked for the employer from September of 2010 until February of 2011. She held the position of Director and Lead Teacher in the Pre-K Section. The witness said that the claimant reported incidents to her and those incidents were reported to the owner. The witness testified that the owner tried to address the situation(s) to resolve them if possible. The incident of the child's injury did not happen while the witness was employed at the Daycare.

The witness said that she did participate in the State investigations and she never wrote any of the incidents down. She now says that the reports probably should have been reduced to writing but she did not do so.

The employer testified that the claimant was a good worker and an excellent teacher. The employer said that she had no problems with the claimant but as the census declined in the area worked by the claimant, it became unrealistic to continue with the program for one child. The claimant had, in the past, expressed reservations about working in the "Toddler Room". At times however she did do it. When the Director left the employ of the Daycare the employer hired two new teachers to take up the workload.

The Daycare closed in August of 2011 because of many circumstances. All employees were allowed to participate in any and all State investigations. Nothing was brought up to the employer by the Director or the claimant. The lay-off of the claimant was based purely on economic factors and the employer did not fight any request for unemployment benefits.

The employer further stated that she would have kept the claimant working if the claimant would have worked full time with the "toddlers". The "Infant Room" was down to one child and that child was close to moving from the area with the family at this point the decision had to be made to lay-off the claimant.

The claimant did appeal several finding of the State review but believes they have run out of time for an appeal and as the Daycare has closed there was no further need to proceed.

FINDINGS OF FACT

RSA 275-E: 2 I (a) No employer shall harass, abuse, intimidate, discharge, threaten, or otherwise discriminate against any employee regarding compensation, terms, conditions, location or privileges of employment because: (a) The employee, in good faith, reports or causes to be reported, verbally or in writing, what the employee has reasonable cause to

believe is a violation of any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States;

RSA 275-E: 2 I (b) The employee objects to or refuses to participate in any activity that the employee, in good faith, believes is a violation of the law;

RSA 275-E:3 Protection of Employees Who Refuse to Execute Illegal Directives. No Employer shall discharge, threaten or otherwise discriminate against any employee regarding such employee's compensation, terms, conditions, location, or privileges of employment because the employee has refused to execute a directive which in fact violates any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States.

All of these sections of the law protect the claimant from any retaliation by the employer when the employee (claimant) participates in reporting violation(s) of law.

It is the finding of the Hearing Officer, based on the filings and the testimony presented for the hearing, that the employer did not take action against the claimant for reporting alleged violations and participating in investigations of the charges.

The testimony shows that the claimant did report perceived violations and they were verbally expressed to the owner. There was also testimony that the owner tried to correct any violations that she could. The owner also testified credibly that she did not have a problem with employees participating in State investigations and she was not permitted to see or hear each person's reports.

It is also found by the Hearing Officer that the employer was credible in her testimony that the claimant expressed concerns about working with toddlers. The claimant preferred the infants to work with. It is clear to this Hearing Officer that the deciding factor was economic conditions, because of lack of children to care for, that the claimant was laid-off. There was no effort to fight the lay-off if there were any hard feelings between the owner and the claimant.

There is no finding for back pay to August 11, 2011. There is no finding for emotional distress. There is no finding for attorney's fees that the attorney had until two weeks after the hearing to submit the billing. The request for "front pay" was withdrawn.

DECISION

As required by Appeal of Mary Ellen Montplaisir 147 N.H. 297 (2001), this Department is required to apply a "mixed motive analysis" on the evidence presented. Because of the circumstantial nature of the evidence alleged by the claimant, the analytical framework of a "pretext analysis" is appropriate. Under this analytical framework, the claimant has the initial burden of establishing a *prima facie* case of unlawful conduct/retaliation. This requires the claimant to show:

1. she engaged in an act protected by the statute;
2. she suffered an action proscribed by the statute (discrimination/termination); and
3. there was a causal connection between the protected act she engaged in (her report of late pay and her mention of the Department of Labor) and the action she suffered as a result of that protected act (discrimination and termination).

The establishment of a *prima facie* case creates a presumption that the employer unlawfully retaliated against the claimant. The burden of proof then shifts to the employer to rebut the claimant's assertions with evidence that their action was taken for legitimate, non-retaliatory reason(s). This burden of proof is only one of production. The claimant retains the burden of proof to persuade. In response to the employer's rebuttal, the claimant has the opportunity to show that the proffered legitimate, non-retaliatory reason for the action was not the true reason for the unlawful conduct/retaliation, and that her assertion was the true reason for the unlawful conduct/retaliation. The claimant can show this by establishing that the employer's proffered reason for the action is either not credible, or by directly showing that the action was more likely motivated by retaliation in response to her protected act.

The claimant did not meet this burden and the appeal is invalid.

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Thomas F. Hardiman
Hearing Officer

Date of Decision: August 7, 2012

Original: Claimant
cc: Employer

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